

After the trial is before the trial

The ICJ's Jadhav case and its uncertain domestic implementation

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The interplay of international court decisions and their domestic implications is currently challenged in the Kulbhushan Jadhav Case ([India v. Pakistan](#)). In this case, the International Court of Justice (ICJ) delivered its verdict on 17 July, 2019. It concerns a 49-year-old former Indian Naval Officer, who was sentenced to death by a Pakistani Military Court on 11 April 2017, on charges of espionage and terrorism. The ICJ ruled against the death sentence awarded to Jadhav and stayed his execution. While this much-awaited decision emphasized on respecting the international obligation of providing consular access and ensuring fair trial for detainees, there is not much clarity with respect to Jadhav's sentence, as Pakistan continues to enjoy considerable amount of autonomy in determining its future course.

The only dissenting opinion was that of ad-hoc judge, Tassaduq Hussain Jillani, former chief justice of Pakistan, who disagreed with the rest on most matters, agreeing only that the Court has jurisdiction to hear India's plea. Judge Jillani was of the opinion that Pakistan lawfully withheld consular access and had already followed fair procedure in the military court.

Factual background and timeline of the case

In its submission to the ICJ, Pakistan claimed that Jadhav was arrested by their authorities in Balochistan on 3rd March, 2016, on allegations of espionage and terrorism. Pakistan alleged that Jadhav was tasked by the Indian Research and Analysis Wing ([RAW](#)) to destabilize the restive province of Balochistan, an area with an ongoing separatist movement.

In contrast, India claimed in its application that Jadhav was 'kidnapped from Iran, where he was carrying on business after retiring from the Indian Navy and was then shown to have been arrested in Baluchistan' (para. 13) on suspicion of espionage and sabotage activities. India alleged that Jadhav was arrested on 3rd March 2016, but that it was informed of his arrest only on 25th March 2016 and that Pakistan failed to inform Jadhav rights under the Vienna Convention on Consular Relations ([VCCR](#)). According to India, Pakistani authorities refused to give India consular access to Jadhav, despite repeated requests.

Jadhav was tried for espionage by the Pakistani Field General Court Martial (FGCM). On 10 April 2017, Inter-Services Public Relations ([ISPR](#)), the media wing of Pakistan's armed forces announced in a press release that Jadhav had been sentenced to death by the FGCM on the charge of espionage. India thereafter

approached the ICJ requesting provisional measures directing Pakistan to ensure that Jadhav was not executed until the court decided the merits of India's claim. On 18 May 2017, the [ICJ ordered](#) a stay on Jadhav's execution.

Jurisdiction and Admissibility

India invoked the jurisdiction of the ICJ under [Article 36\(1\)](#) of the Statute of the ICJ in conjunction with Article I of the Optional Protocol to the VCCR concerning the Compulsory Settlement of Disputes, to which both India and Pakistan are State Parties. Pakistan did not object to the jurisdictional claims. However, Pakistan objected the admissibility on three grounds. It contended that since India had (1) abused of process of law, (2) abused its rights, and (3) approached the court with unclean hands, its application must not be admitted.

The ICJ rejected all these arguments. *Firstly*, Parties are not mandated to exhaust the resolution mechanisms available under Articles II and III of the Optional Protocol (arbitration and conciliation) before approaching the ICJ. *Secondly*, Pakistan's allegations that India had acted in contravention of [Security Council Resolution 1373 of 2001](#), amongst others, concerned the merits of the case and not the admissibility claim per se. *Thirdly*, the Court stated that the clean hands doctrine on its own could not make the claim inadmissible, especially when Pakistan failed to explain the link between India's violation which disabled it from fulfilling its international obligation to provide consular access.

Merits and Remedies

[Article 36\(1\)\(b\)](#) of the VCCR makes it clear that the detaining State is required to inform the detainee of his rights under the provision. It also imposes an obligation, when read in conjunction with [Article 36\(1\)\(c\)](#), on such receiving State to inform the consular post of the sending State about such detention. Pakistan maintained that Jadhav was involved in activities of espionage and, thus, not entitled to benefits of consular access.

The ICJ found that Pakistan had violated its international obligation under Article 36 of the VCCR. Pakistan had not only failed to inform Jadhav of his rights, but also to inform India, without delay, about Jadhav's arrest and detention. Despite India's repeated to effectuate communication, Pakistan had denied consular access to Jadhav. The Court also denied Pakistan's contention that the [2008 bilateral agreement](#) between the two nations restricted the rights guaranteed by Article 36 of the VCCR. In fact, the ICJ emphasized that there was no intention to curtail rights of detainees in the 2008 Agreement.

The ICJ stated that Pakistan is under an obligation to immediately stop the internationally wrongful act of denying consular access, and to comply with the VCCR. Further, the Court urged Pakistan to provide, *by means of its own choosing*, effective review and reconsideration of Jadhav's conviction and sentence.

Grey Areas: Pakistan's autonomy in deciding Jadhav's fate

The remedies sought by India pertaining to the annulment of the decision of the FGCM, and securing Jadhav's release and ordering his return to India were rejected by the ICJ. In this regard, the judgment is consistent with and further reinforces the jurisprudence of the ICJ in its previous cases of [LaGrand](#) and [Avena](#), wherein the court showed willingness to intervene – but largely on procedural grounds. The Court dealt only with violations of Pakistan's international obligations but did not delve into the correctness of the decision of the FGCM on merits.

This means that Jadhav is not 'off the hook'. Only on the basis of Pakistan's breach of the VCCR, the charges of espionage and terrorist activities would not be erased. Jadhav will have to undergo trial again in Pakistan. So long as Indian consular officers would have access to Jadhav and be able to give him assistance, it could very well be that a new court would arrive at the same verdict, if the process of review and reconsideration is effective by Pakistan's standards.

Pakistan, therefore, has an opportunity to conduct a sham trial to find Jadhav guilty again. Since India could approach the ICJ for another scrutiny, Pakistan may not be able to afford that. It is most likely, therefore, that Pakistan will conduct a trial which is open to the public. Such a trial will have to be fairer than the closed military court trial that Jadhav underwent previously. This could be good news for Jadhav and India. Now that Jadhav would be given consular access, India can provide assistance in documentation and evidence and better aid the investigation process. India can further ensure that Pakistan gives effect to the due process of law in deciding Jadhav's case again.

Consular Access

Pakistan has announced that it will grant consular access to Jadhav in accordance with Pakistani laws – but, India apprehends that the condition "*according to Pakistan laws*" could limit consular access, contrary to the standard rule. Till today, India has entered into consular conventions with only four countries, [East Germany \(1974\)](#), [Czechoslovakia \(1974\)](#), [China \(1991\)](#), and [Russia \(1986\)](#). As there exists no such agreement between India and Pakistan, there is no clarity as to what kind of access Jadhav will be provided.

For now, the future seems uncertain as Pakistan has the power of *choosing its own means* in deciding Jadhav's case. Pakistan may choose to control the consular access provided, by mandating the presence of a Pakistani agent during the time of conversation. For instance, at a previous time, the presence of Pakistani authorities was agreed upon during the meeting between Jadhav and his mother and wife. In such a situation, the detainee may fear reprisal if the police knew of the communication. He may want to communicate to a consul the fact that the police are mistreating him but may not be able to. If privacy of communication is not assured, the purpose of having such communication may be vitiated.

Concluding Remarks

There have been two instances in the past that the ICJ has finally decided on a dispute arising out of Article 36 of the VCCR – [LaGrand](#) and [Avena](#). The reception

of the ICJ judgements in domestic forums sets a dangerous precedent in trying to determine the course of Jadhav's case in the Pakistani domestic Court hereafter. The U.S. Supreme Court in [Medellín v. Texas](#) found that the decision of the ICJ in *Avena* was not directly enforceable as domestic law in state court. Since the ICJ decision has direct binding force only between states, a detainee (as in this case) cannot be considered a party to the ICJ judgement. The decision of the ICJ in India's favour does not assure Jadhav's acquittal and release.

The ICJ does not have the power to act as a criminal appellate forum and decide on the correctness of the judgement of the Pakistani Court – all it can do is urge Pakistan to give effect to the principles of natural justice. Therefore, while we can consider the judgement of the ICJ a diplomatic win for India, it is impossible to deny the vast extent of autonomy Pakistan enjoys in the future of this case. If Pakistan chooses to provide consular access, carry out trial and arrive at the same decision, there is very little that India can do.

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